



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 60, 61, 62, and 70

[EPA-R08-OAR-2021-0732; FRL-9829-02-R8]

Approval of Clean Air Act Operating Permit Program Revisions; Negative Declaration of Existing Hospital/Medical/Infectious Waste Incinerators and Administrative Updates; South Dakota

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule.

SUMMARY: With this direct final rule, the Environmental Protection Agency (EPA or the “Agency”) is promulgating approval of revisions to the South Dakota operating permit program for stationary sources under Clean Air Act (CAA) title V (the “title V program”), a Clean Air Act (CAA) section 111(d)/129 negative declaration for incinerators subject to the Hospital/Medical/Infectious Waste Incinerators (HMIWI) Emissions Guidelines, and making administrative updates. EPA is taking this final action in accordance with the CAA.

DATES: This direct final rule is effective on [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER] without further notice, unless EPA receives adverse written comments on or before [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]. If adverse comments are received, EPA will publish a timely withdrawal of the direct final rule in the *Federal Register* informing the public that the rule will not take effect.

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA-R08-OAR-2021-0732. All documents in the docket are listed in the www.regulations.gov index. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted

material, will be publicly available only in hard copy. Publicly available docket materials are available electronically in *www.regulations.gov*. To reduce the risk of COVID-19 transmission, for this action we do not plan to offer hard copy review of the docket. Please email or call the person listed in the **FOR FURTHER INFORMATION CONTACT** section if you need to make alternative arrangements for access to the docket.

FOR FURTHER INFORMATION CONTACT: Carson Coate, Air and Radiation Division, EPA, Region 8, Mail code 8ARD, 1595 Wynkoop Street, Denver, Colorado, 80202-1129, telephone number: (406) 457-5042, email address: coate.carson@epa.gov.

SUPPLEMENTARY INFORMATION: Throughout this document “we,” “us,” and “our” means EPA.

I. Why is EPA Using a Direct Final Rule?

EPA is publishing this rule without prior proposal because the Agency views this as a noncontroversial action and anticipates no adverse comments. However, elsewhere in this issue of the *Federal Register* publication, EPA is publishing a separate document that will serve as the proposal to approve South Dakota’s title V program revisions, the negative declaration for 40 CFR part 60, subpart Ce, and the administrative updates to 40 CFR 60.4 and 61.04, if relevant adverse comments are filed.

If EPA receives adverse comments, EPA will publish a timely withdrawal in the *Federal Register* informing the public that this direct final rule will not take effect. EPA will address all public comments in a subsequent final rule based on the proposed rule. EPA will not institute a second comment period on this action. Any parties interested in commenting must do so at this time.

II. Background

Title V of the CAA as amended (42 U.S.C. 7401 *et seq.*) directs states to develop and submit to EPA programs for issuing operating permits to all major stationary sources and to

certain other sources.¹ As required under title V, EPA promulgated regulations establishing the minimum elements of an approvable state title V program and defined the corresponding procedures by which the EPA will approve, oversee and, when necessary, withdraw approval of a state title V program.² South Dakota received final, full approval of its title V program effective on February 28, 1996.³

Sections 111(d) and 129 of the CAA require states to submit plans to control certain pollutants (designated pollutants) at existing solid waste combustor facilities (designated facilities) whenever standards of performance have been established under section 111(b) for new sources of the same type, and EPA has established emissions guidelines for such existing sources.⁴ CAA section 129 directs EPA to establish standards of performance for new sources (NSPS) and emissions guidelines for existing sources for each category of solid waste incineration unit.⁵ Under CAA section 129, NSPS and emissions guidelines must contain numerical emissions limitations for particulate matter, opacity (as appropriate), sulfur dioxide, hydrogen chloride, oxides of nitrogen, carbon monoxide, lead, cadmium, mercury, and dioxins and dibenzofurans.⁶ While NSPS are directly applicable to affected facilities, emissions guidelines for existing units are intended for states to use to develop a state plan to submit to EPA.⁷ When an affected facility is located in a state, the state must then develop and submit a plan for the control of the designated pollutant.⁸ Once approved by EPA, the state plan becomes federally enforceable. If a state does not submit an approvable state plan to EPA, EPA is responsible for developing, implementing, and enforcing a federal plan.⁹

¹ 42 U.S.C. 7661a.

² 40 CFR part 70.

³ 61 FR 2720 (Jan. 29, 1996).

⁴ 42 U.S.C. 7411(d), 7429(b)(2).

⁵ 42 U.S.C. 7429(a).

⁶ Id. 7429(a)(4).

⁷ Id. 7429(b)(2).

⁸ Id. See also id. 7411(d)(1).

⁹ Id.

The regulations at 40 CFR part 60, subpart B (Subpart B), contain general provisions applicable to the adoption and submittal of state plans for controlling designated pollutants. Additionally, 40 CFR part 62, subpart A, provides the procedural framework by which EPA will approve or disapprove such plans submitted by a state. However, 40 CFR 60.23(b) and 62.06 provide that if there are no existing sources of the designated pollutant in the state, the state may submit a letter of certification to that effect (i.e., a negative declaration) in lieu of a plan. The negative declaration exempts the state from the requirements of Subpart B that require the submittal of a CAA section 111(d)/129 plan.¹⁰

EPA promulgated the HMIWI NSPS and emissions guidelines in 1997 and 2009. The emissions guidelines are codified at 40 CFR part 60, subpart Ce. Thus, states were required to submit plans for incinerators subject to the HMIWI emissions guidelines pursuant to sections 111(d) and 129 of the Act and Subpart B or negative declarations pursuant to 40 CFR 60.23(b) and 62.06.¹¹

III. State Submittal

On January 3, 2020, in accordance with 40 CFR 70.4(i), South Dakota submitted a request for approval of title V program revisions to incorporate updated federal regulations through July 1, 2018, thereby aligning state rules in South Dakota's Administrative Rules of South Dakota (ARSD) with federal rules at 40 CFR part 70.¹² Specifically, South Dakota requested this change to Chapter 74:36:05 – Operating Permits for Part 70 Sources (sections 74:36:05:04(2) and (3), and 74:36:05:16.01(4), (8), (9), (17) and (18)) and Chapter 74:36:13 – Continuous Emission Monitoring Systems (section 74:36:13:08).¹³ South Dakota's submittal included clean and redlined copies of the revised ARSD, which are available in the docket for

¹⁰ 40 CFR 60.23(b).

¹¹ 40 CFR 60.39e.

¹² See South Dakota 111d Package to EPA, p. 100, 120, 123-124, January 3, 2020 (public notice explaining purpose of the regulations and Proposed Amendments explaining requested changes).

¹³ Letter from Hunter Roberts, Secretary, South Dakota Department of Environment and Natural Resources, to Gregory Sopkin, Regional Administrator, EPA Region 8, January 3, 2020. This letter contained multiple requests. In this action we are addressing only the request to revise South Dakota's title V operating permit program. See *id.* at p. 5-6.

this action. The submittal also included evidence that public notice of the State’s proposed submittal ran in eleven South Dakota newspapers, that impacted sources and other interested parties were notified, and a public hearing was held on October 17, 2019.¹⁴ The State received no adverse public comments on the requested changes to 74:36:05 and 74:36:13.

On June 7, 2021, South Dakota submitted a negative declaration for the HMIWI emissions guidelines in accordance with CAA sections 111(d) and 129 and 40 CFR 60.23(b) and 62.06. The negative declaration certified that no incinerators subject to the HMIWI emissions guidelines and the requirements of sections 111(d) and 129 of the CAA exist in South Dakota. Specifically, South Dakota had one facility, located at the University of South Dakota, that was considered a co-fired combustor under the HMIWI NSPS. The University of South Dakota disconnected the natural gas supply line to the incinerator in 2012 and requested that the incinerator be removed from its title V air quality operating permit in 2019.¹⁵ Therefore, South Dakota determined that there were no longer any sources subject to the HMIWI emissions guidelines.¹⁶

On April 16, 2021, South Dakota’s Office of Attorney General submitted a letter notifying EPA of the establishment of the South Dakota Department of Agriculture and Natural Resources (DANR). The letter stated that on January 19, 2021, South Dakota Governor, Kristi Noem, executed Executive Order 2021-03, which provided for the merger of the South Dakota Department of Agriculture (DOA) and the South Dakota Department of Environment and Natural Resources (DENR) into one department—the DANR. According to the South Dakota Constitution, executive reorganization orders become effective “within ninety days after submission” of the executive order to the South Dakota Legislature (Legislature) unless one of the two houses of the Legislature disapproves of the executive reorganization (S.D. Constitution,

¹⁴ South Dakota 111d Package to EPA, p. 793-797.

¹⁵ Letter from Brian Limoges, Assistant Vice President of Facilities Management, University of South Dakota, to Kyrik Rombough, South Dakota Department of Environment and Natural Resources, Re: Incinerator Permit 28.2201-19, July 13, 2019.

¹⁶ Letter from Kyrik Rombough, South Dakota Department of Agriculture and Natural Resources, to Carl Daly, Acting Director of Air & Radiation Division, EPA Region 8, June 7, 2021.

Article IV, Section 8).¹⁷ During the 2021 session, neither house of the Legislature passed a resolution of disapproval of Governor Noem's Executive Order 2021-03 and the Order became effective April 19, 2021.¹⁸

In the April 16, 2021 letter, Assistant Attorney General Steven R. Blair stated that all State programs previously authorized to carry out EPA programs would continue to function in the same manner and all current environmental protection activities conducted under existing EPA approved or delegated programs under the DOA and/or the DENR would continue intact under the newly established DANR. Further, Mr. Blair stated that the merger caused no substantive budgetary or personnel changes, that the new DANR has all the authorities, powers, and duties of the previous DOA and DENR, and that the laws in effect at the time EPA approved or delegated authority to DOA and/or DENR continue to be fully effective and enforceable. Mr. Blair explained that the merger did not require any substantive changes to state law or administrative rules; the statutes and rules were merely updated to reflect the name of the new department.¹⁹

In a January 20, 2022 letter, the Secretary of the DANR, Hunter Roberts (the Governor's designee), submitted a request that EPA recognize the merger of South Dakota's DOA with the DENR to form the new DANR and incorporate corresponding revisions to the ARSD related to South Dakota's state implementation plan (SIP). Secretary Roberts stated that the ARSD provisions were automatically updated with the DANR's new name during the merger process. Additionally, Secretary Roberts stated that South Dakota's Board of Minerals and Environment approved the DANR's request to ask EPA to recognize the department's new name in South Dakota's SIP during a public hearing on December 16, 2021. Secretary Roberts further confirmed that the merger did not cause a substantive change to state law or administrative rules

¹⁷ SD DANR Merger SIP Submittal, January 21, 2022, p. 27-28, Letter from Steven R. Blair, Assistant Attorney General, South Dakota Office of Attorney General, to Deb Thomas, Acting Regional Administrator, EPA Region 8, Re: Establishment of South Dakota Department of Agriculture and Natural Resources, April 16, 2021.

¹⁸ SD DANR Merger SIP Submittal, p.1, Letter from Hunter Roberts, Secretary, South Dakota Department of Agriculture and Natural Resources, to KC Becker, Regional Administrator, EPA Region 8, January 20, 2022.

¹⁹ SD DANR Merger SIP Submittal, p. 27-28.

and that DANR maintains the same authorities, powers, and duties covered and implemented under the previous department name.²⁰

IV. Final Action

South Dakota submitted the necessary information for EPA to review the title V program revisions, the 111(d) negative declaration, and the non-substantive revisions to South Dakota's ARSD to reflect the merger of South Dakota's DOA with the DENR to form the new DANR. EPA is now acting to fully approve South Dakota's January 3, 2020 and January 20, 2022 title V program revisions under 40 CFR 70.4(i). Specifically, we are approving changes to ARSD 74:36:05:04(2) and (3), 74:36:05:16.01(4), (8), (9), (17) and (18), and 74:36:13:08 so that they align with federal regulations promulgated through July 1, 2018.

In addition, we are approving the department name change to the DANR in South Dakota's title V program fees rule at ARSD 74:37:01:08. In its SIP submittal dated January 20, 2022, South Dakota inadvertently included this non-SIP provision. In a March 4, 2022 email, Kyrik Rombough, South Dakota's State Air Director, confirmed that ARSD 74:37:01:08 contains the fee provision for the State's title V operating permit program and should be included in the update to the title V program.²¹ Thus, EPA is taking action to approve the change to ARSD 74:37:08 in this direct final rule. We are also updating 40 CFR part 70, appendix A to reference the January 3, 2020, and January 20, 2022 requested revisions. We are also making an administrative update to 40 CFR part 70, appendix A to delete reference to the expiration of an outdated interim approval and instead include reference to our full approval of South Dakota's title V program in 1996.

EPA is also approving South Dakota's June 7, 2021 negative declaration certifying that no incinerators subject to the HMIWI emissions guidelines and the requirements of sections

²⁰ SD DANR Merger SIP Submittal, p.1, Letter from Hunter Roberts, Secretary, South Dakota Department of Agriculture and Natural Resources, to KC Becker, Regional Administrator, EPA Region 8, January 20, 2022.

²¹ See Email dated March 4, 2022, from Kyrik Rombough, Engineer Manager III, South Dakota Department of Agriculture and Natural Resources, to Monica Morales, Acting Deputy Director, EPA Region 8 Air and Radiation Division.

111(d) and 129 of the CAA exist in South Dakota per CAA sections 111(d) and 129 and 40 CFR 60.23(b) and 62.06. We are also updating 40 CFR part 62, subpart QQ, and 40 CFR part 62, subpart A. The negative declaration fulfills South Dakota's obligations under CAA sections 111(d) and 129. The submittal of this negative declaration exempts South Dakota from the requirement to submit a state plan for incinerators subject to the HMIWI emissions guidelines under 40 CFR part 60, subpart Ce.

EPA is also changing "Department of Environment and Natural Resources" to "Department of Agriculture and Natural Resources" in 40 CFR 60.4(b)(43) and changing "Department of Water and Natural Resources" to "Department of Agriculture and Natural Resources" in 61.04(b)(43). These are non-substantive, administrative changes that reflect DANR's new name.

V. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a state title V program submittal that complies with the provisions of the Act and applicable federal regulations; 40 CFR 70.4(i). Thus, in reviewing title V program submittals, EPA's role is to approve state choices, provided they meet the criteria of the CAA and the criteria, standards and procedures defined in 40 CFR part 70. The Administrator is also required by the CAA to approve a CAA section 111(d)/129 submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7411(d); 42 U.S.C. 7429; 40 CFR part 60, subparts B and Ce; and 40 CFR part 62, subpart A. Accordingly, this action merely approves state law as meeting Federal requirements beyond those imposed by state law.

For that reason, this action:

- Is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);

- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this action is not approved to apply in Indian country, as defined at 18 U.S.C. 1151, or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction.

As such, this rule does not have tribal implications and will not impose substantial direct costs on tribal governments or preempt tribal law as specified by Executive Order 13175 (65 FR 67249, November 9, 2000).

The Congressional Review Act, 5 U.S.C. 801 *et seq.*, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the

rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the *Federal Register*. A major rule cannot take effect until 60 days after it is published in the *Federal Register*. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements (see section 307(b)(2)).

List of Subjects

40 CFR Part 60

Environmental protection, Administrative practice and procedure, Air pollution control, Aluminum, Beverages, Carbon monoxide, Chemicals, Coal, Electric power plants, Fluoride, Gasoline, Glass and glass products, Grains, Greenhouse gases, Hazardous substances, Household appliances, Industrial facilities, Insulation, Intergovernmental relations, Iron, Labeling, Lead, Lime, Metals, Motor vehicle pollution, Natural gas, Nitrogen dioxide, Petroleum, Phosphate, Plastics materials and synthetics, Polymers, Reporting and recordkeeping requirements, Rubber and rubber products, Sewage disposal, Steel, Sulfur oxides, Vinyl, Volatile organic compounds, Waste treatment and disposal, Zinc.

40 CFR Part 61

Environmental protection, Administrative practice and procedure, Air pollution control, Arsenic, Asbestos, Benzene, Beryllium, Hazardous substances, Intergovernmental relations, Mercury, Radioactive materials, Radon, Reporting and recordkeeping requirements, Uranium, Vinyl chloride.

40 CFR Part 62

Environmental protection, Administrative practice and procedure, Air pollution control, Aluminum, Fertilizers, Fluoride, Industrial facilities, Intergovernmental relations, Methane, Ozone, Phosphate, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds, Waste treatment and disposal.

40 CFR Part 70

Environmental protection, Air pollution control, Intergovernmental relations, Title V.

Dated: May 8, 2022.

KC Becker,
Regional Administrator,
Region 8.

40 CFR parts 60, 61, 62 and 70 are amended as follows:

PART 60—STANDARDS OF PERFORMANCE FOR NEW STATIONARY SOURCES

1. The authority citation for part 60 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.* 42 U.S.C. 7401-7601.

Subpart A—General Provisions

2. In § 60.4, revise paragraph (b)(43) to read as follows:

§ 60.4 Address.

* * * * *

(b) * * *

(43) State of South Dakota, Air Quality Program, Department of Agriculture and Natural Resources, Joe Foss Building, 523 East Capitol, Pierre, SD 57501–3181.

* * * * *

PART 61—NATIONAL EMISSION STANDARDS FOR HAZARDOUS AIR POLLUTANTS

3. The authority citation for part 61 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart A—General Provisions

4. In § 61.04, revise paragraph (b)(43) to read as follows:

§ 61.04 Address.

* * * * *

(b) * * *

(43) State of South Dakota, Department of Agriculture and Natural Resources, Air Quality Program, Joe Foss Building, 523 East Capitol, Pierre, SD 57501-3181.

* * * * *

PART 62—APPROVAL AND PROMULGATION OF STATE PLANS FOR DESIGNATED FACILITIES AND POLLUTANTS

5. The authority citation for part 62 continues to read as follows:

Authority: 42 U.S.C. 7401 *et seq.*

Subpart QQ—South Dakota

6. Revise § 62.10360 to read as follows:

§ 62.10360 Identification of plan.

The State of South Dakota submitted a letter on June 7, 2021, certifying that there are no designated facilities subject to the emissions guidelines for existing hospital medical infectious waste incinerators under 40 CFR part 60, subpart Ce, operating within the State's jurisdiction.

§§ 62.10361 and 62.10362 [Removed]

7. Remove §§ 62.10361 and 62.10362.

PART 70—STATE OPERATING PERMIT PROGRAMS

The authority citation for part 70 continues to read as follows:

8. The authority citation for part 70 continues to read as follows:

Authority: 42 U.S.C. 7401, *et seq.*

9. In appendix A to part 70 the entry “South Dakota” is amended by revising paragraph (a) and adding paragraph (d) to read as follows:

Appendix A to Part 70—Approval Status of State and Local Operating Permits

Programs

* * * * *

South Dakota

(a) South Dakota Department of Agriculture and Natural Resources: submitted on November 12, 1993; full approval effective on February 28, 1996.

* * * * *

(d) The State of South Dakota submitted operating permit program revisions on January 3, 2020 and January 22, 2022. On January 3, 2020, South Dakota submitted for program

approval revisions to the Administrative Rules of South Dakota, Chapters 74:36:05:04(2), 74:36:05:04(3), 74:36:05:16.01(4), 74:36:05:16.01(8), 74:36:05:16.01(9), 74:36:05:16.01(17), 74:36:05:16.01(18), and 74:36:13:08. The state effective date of these revisions is November 25, 2019. On January 22, 2022, South Dakota submitted for program approval revisions to Administrative Rules of South Dakota, Chapter 74:37:01:08. The state effective date is April 19, 2021. The revisions are effective on **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

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[FR Doc. 2022-10224 Filed: 5/17/2022 8:45 am; Publication Date: 5/18/2022]